

TITLE 22

EMERGENCY REGULATIONS

PHASE I ENVIRONMENTAL SITE ASSESSMENTS (PROPOSED NEW AND EXPANDING SCHOOL SITES)

Department Reference Number: R-2004-01

Office of Administrative Law Emergency Number:

FINDING OF EMERGENCY

Pursuant to section 11346.1 of the Government Code, the Department of Toxic Substances Control (DTSC) finds that adoption of these emergency regulations is necessary for the immediate preservation of the public health and safety and general welfare.

AUTHORITY AND REFERENCE

These regulations are being proposed under the following authorities:

Health and Safety Code section 58012 (Added by Gov. Reorg. Plan No. 1, §146, eff. July 17, 1991.) This section provides DTSC with the authority to adopt and enforce rules and regulations needed for the execution of its duties.

Education Code section 17210, subsection (g). This section authorizes DTSC to adopt final regulations that establish guidelines for Phase I Environmental Site Assessments for proposed new and expanding school sites.

These regulations implement, interpret, or make specific the following:

Education Code section 17210, subsection (g). This section specifies the need for DTSC to adopt final regulations that establish guidelines for Phase I Environmental Site Assessments for proposed new and expanding school sites.

Education Code section 17213.1. This section specifies the role of DTSC in the Phase I Environmental Site Assessment process.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Existing Law

Education Code sections 17210, 17210.1, 17213.1, and 17213.2 specify the comprehensive environmental review process under DTSC oversight for proposed new and expanding school sites. DTSC's School Property Evaluation and Cleanup

(Schools) Division is responsible for assessing, investigating, and cleaning up proposed and expanding school sites. DTSC ensures that school sites are free of contamination, or that they have been cleaned up to a level that protects the students and staff who will occupy the new school. All proposed school sites that will receive State funding for acquisition or construction are required to go through a rigorous environmental review and cleanup process under DTSC's oversight. The environmental review process typically includes a Phase I Environmental Site Assessment (Phase I), Preliminary Endangerment Assessment (PEA), and if necessary, a response action that is protective of the public, including children's health, with an ample margin of safety. As the only comprehensive school environmental evaluation program in the United States, DTSC continues to set the national standard.

Existing State regulations (Cal. Code Regs., tit. 22, div. 4.5, ch. 51.5, commencing with § 69100) establish guidelines for completion of a Phase I and Phase I Addendum. The regulations include procedures for sampling and analysis of lead in soil from lead-based paint and/or polychlorinated biphenyls (PCBs) in soil from electrical transformers and submittal of those results in a Phase I Addendum, rather than a PEA. This has eliminated the need for a PEA for sites at which these are the only potential sources of contamination and concentrations of these contaminants do not exceed levels protective of public health and the environment. The existing regulations also streamline the environmental review process by allowing sampling to be completed within the Phase I and Phase I Addendum processes, and help minimize site assessment costs for properties otherwise considered unlikely to have contamination, such as residential properties.

Policy Statement Overview

Broad Objectives: These emergency regulations are necessary to continue supporting the efforts of the State of California to increase the number of school facilities while protecting children and staff from the potential effects of exposure to hazardous materials. These emergency regulations will also require consistency with updated federal standards to ensure that school assessments are conducted in accordance with national standards and so federal and/or State liability protection may be available to school districts. Additionally, the emergency amendment will streamline and thereby improve the site assessment process for proposed new and expanding school sites by allowing submittal of test results for organochlorine pesticides (OCPs) in soil from termiticide application in a Phase I Addendum.

Specific Objectives: These emergency regulations are necessary to ensure DTSC compliance with the latest American Society for Testing and Materials (ASTM) national standard for Phase Is, to streamline the process, minimize costs associated with environmental review of properties otherwise considered unlikely to have contamination, such as residential properties, and ensure consistency with federal laws. Existing

regulations refer to an outdated federal standard for Phase Is, ASTM Standard E1527-00, and allow submittal of sampling and analytical results for lead in soil from lead-based paint and PCBs in soil from electrical transformers in a Phase I Addendum. Based upon DTSC's Residential Pesticide Study, OCPs from termiticide application may be present around structures with wood components at residential and commercial structures. OCPs may pose an unacceptable health risk if located in soils at proposed school sites. These emergency regulations incorporate the updated federal standards and allow submission of sampling and analytical results for OCPs in soil from termiticide application in a Phase I Addendum.

Proposed Regulations

DTSC proposes to amend existing regulations to: (1) avoid conflict with the ASTM national standard for Phase Is; (2) streamline the process and minimize costs associated with environmental review of properties otherwise considered unlikely to have contamination, such as residential properties where OCPs from termiticide application may be present; and (3) ensure consistency with State laws and policies of DTSC. Additional detail for each objective is provided below.

- (1) ASTM Standard E1527-05 is now the nationally recognized standard for conducting Phase Is and is the primary reference for conducting Phase Is for proposed new and expanding school sites. Reference to ASTM Standard E1527-00, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process, as cited in the existing regulations, has been superseded by the new standard approved on November 1, 2005, ASTM Standard E1527-05. The existing regulations need to be amended to reflect this change. School districts rely on environmental assessors to conduct Phase Is, Phase I Addenda, and PEAs. It is critical that environmental assessments be conducted using the national standard, for environmental assessments conducted after November 1, 2006 or after the emergency regulations are in place.
- (2) Existing regulations allow submittal of sampling and analytical results for lead in soil from lead-based paint and PCBs in soil from electrical transformers in a Phase I Addendum. The existing regulations streamline the process and minimize costs associated with environmental review for properties otherwise considered unlikely to have contamination, such as residential properties, by allowing submittal of a Phase I Addendum for specified chemicals in soils, in lieu of a PEA. School districts and their environmental assessors or consultants generally utilize the Phase I and Phase I Addendum to evaluate former residential properties where there is less likelihood of contamination than might be found at industrial properties. The Phase I Addendum may be submitted for DTSC review and approval immediately after the Phase I, or may be submitted

subsequent to receipt of school funding for property acquisition or construction, so long as it is submitted prior to actual construction. In contrast, the PEA generally requires more substantial preparation and DTSC approval of a workplan prior to sampling, as well as an expanded report. The PEA must be submitted prior to receipt of school funding for property acquisition and/or construction.

In the emergency regulations, DTSC proposes to also allow submittal of sampling and analytical results in Phase I Addenda for OCPs in soil from termiticide application. Based on available literature, findings of the "Residential Pesticide Study" conducted by DTSC using grant funds from the United States Environmental Protection Agency (U.S. EPA), and experience of DTSC's Schools Division, OCPs from termiticide application may be present around structures with wood components. OCPs are hazardous substances (pesticides) which may pose an unacceptable health risk if located at proposed school sites. Potential contamination from lead-based paint, electrical transformers, and termiticide application may be the only reason a PEA is required at properties otherwise considered unlikely to have contamination, such as residential properties. The emergency regulations are consistent with the existing regulations, by allowing sampling and analytical results for OCPs in soil from termiticide application to be included in a Phase I Addendum. In addition, the emergency regulations will streamline and minimize costs associated with environmental review of these types of proposed school sites.

If sampling and analytical results for OCPs in soil from termiticide application could not be submitted in a Phase I Addendum, school districts would be required to complete a PEA for all proposed school sites with structures that have wood components. This would result in significant increased costs for assessment of proposed school sites that otherwise were considered unlikely to have contamination, such as residential properties. These regulations present straightforward sampling protocols and specify analytical methods to be used to evaluate OCPs in soil from termiticide application. Sampling and analytical results will be evaluated in a human health screening evaluation approved by DTSC.

- (3) DTSC will reference the new ASTM Standard E1527-05, developed concurrently with All Appropriate Inquiries (AAI) provisions, to maintain consistency between State and federal laws, and will expand DTSC's current Phase I Addendum process to include OCPs as described below.

The State also passed legislation to provide liability protections under State law, Assembly Bill 389 (ch. 705, stats. 2004) also known as the California Land Reuse and Revitalization Act of 2004 (CLRRA). To be eligible for liability relief

under CLRRRA, bona fide purchasers, contiguous property owners, and innocent landowners, must comply with AAI as provided by Health and Safety Code section 25395.65. ASTM Standard E1527-05 must be used for that purpose.

These emergency regulations would amend California Code of Regulations title 22, division 4.5, chapter 51.5 by amending the title for purposes of clarity to read: Chapter 51.5 Assessment of School Sites and add Article 1. Phase I Environmental Site Assessments (Proposed New and Expanding School Sites). These changes will make the regulations more clear for DTSC's stakeholders, including but not limited to: school districts, environmental assessors, consultants, communities, and the public at large.

Section 69100. Purpose. This section is necessary to explain why guidelines for the development of a Phase I Environmental Site Assessment are required. This section would allow sampling and analysis of OCPs in soil from termiticide application in Phase I Addendum reports. This amendment is consistent with the findings of the Residential Pesticide Study conducted by DTSC, and is in compliance with the purpose stated in the revised ASTM Standard E1527-05 (see "Section I. Scope," pages 1-2 in ASTM).

Section 69101. Applicability. This section makes one change for purposes of clarity to change "chapter" to "article."

Section 69102. Definitions. This section makes one change for purposes of clarity to change "chapter" to "article." It adds another class of hazardous substances as eligible for Phase I Addendum sampling and analysis, i.e., OCPs in soil from termiticide application, based on the findings of the Residential Pesticide Study conducted by DTSC, in which the presence of OCPs was identified at numerous former residential structures. The organochlorine insecticides are a diverse group of chemical agents belonging to three distinct chemical classes that break down slowly and can remain in the environment long after application, and in organisms long after exposure. ASTM Standard E1527-05 defines "hazardous substances" (see Section 3.2.36, page 5); this definition includes pesticides, such as OCPs.

Section 69103. References. Revisions to this section are necessary to incorporate the updated reference to the revised Final Rule in the Federal Register, with the new AAI regulation, and use of the revised ASTM Standard E1527-05 (see 40 CFR, Part 312 [SFUND-2004-0001; FRL-7806-2]). Use of this standard is intended to "...define good commercial and customary practice in the United States of America for conducting an environmental site assessment of a parcel of real estate with respect to the range of contaminants. . ." and to "...permit a user to satisfy one of the requirements to qualify for the innocent landowner, contiguous property owner, or bona fide prospective purchaser. . ." to qualify for limitations on liability under State and federal law (see Section 1.1, Purpose, page 1 in ASTM). Several minor revisions are made to references, such as updating website addresses, for purposes of clarity only. Without

these revisions, the public may not be able to find the appropriate documents incorporated by reference.

Section 69104. Preparation of a Phase I. This section makes one change for purposes of clarity to add “this article.” It also adds “shall” to require submission of Phase Is to DTSC, as required by the Education Code (Section 17213.1(a)). This section also adds OCPs used for termiticide application as a class of hazardous substances as being appropriate for evaluation via submittal of sampling results and analyses in a Phase I or Phase I Addendum, with similar sampling protocols as those already provided for lead-based paint and PCBs in soil. These changes are consistent with the findings of the Residential Pesticide Study conducted by DTSC, and are in compliance with ASTM Standard E1527-05 which defines “hazardous substances” (see Section 3.2.36, page 5) to be identified in Phase Is. This definition includes pesticides, such as OCPs.

Section 69105. Sampling for Lead in Soil from Lead-based Paint. No changes are proposed.

Section 69106. Sampling for OCPs in Soil. This new section establishes straightforward sampling protocols and specifies analytical methods to be used to evaluate OCPs in soil from termiticide application. This section is consistent with the findings of the Residential Pesticide Study conducted by DTSC and is in compliance with ASTM Standard E1527-05, which defines “hazardous substances” (see Section 3.2.36, page 5) to be identified in Phase Is. This definition includes pesticides, such as OCPs.

Section 69107. Sampling for PCBs in Soil from Electrical Transformers. This section has been renumbered with minor formatting changes.

Section 69108. Phase I Recommendations. This section has been renumbered. It has also been amended to add OCPs in soil from termiticide application to the conditions for making recommendations in the Phase I. DTSC is required to make determinations for each prospective new or expanded school site on a case-by-case basis to ensure that OCP concentrations in soils do not endanger students or teachers and the environment. These changes are consistent with the Residential Pesticide Study conducted by DTSC and are in compliance with the ASTM Standard E1527-05, which defines “hazardous substances” (see Section 3.2.36, page 5) to be identified in Phase Is. This definition includes pesticides, such as OCPs.

STATEMENT OF FACTS SUPPORTING FINDING OF EMERGENCY

DTSC finds this emergency rulemaking necessary to preserve the general welfare of our State, and to protect the health and welfare of California’s school children and staff.

These regulations incorporate the newest federal standards and streamline the environmental testing of prospective schoolsites, thereby facilitating the construction of new or expanding schools to address severe over-crowding school facilities. The federal 2002 Brownfields Amendments to the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) required U.S. EPA to develop regulations establishing standards and practices for conducting AAI. To satisfy this requirement, U.S. EPA developed a Final Rule for "Standards and Practices for All Appropriate Inquiries" (40 C.F.R. § 312) that became effective on November 1, 2006. To be eligible for federal liability protections under the 2002 Brownfields Amendments, bona fide purchasers, contiguous property owners, and innocent landowners must comply with AAI and use ASTM Standard E1527-05 to satisfy this requirement. U.S. EPA provided statewide training on the new federal regulations in mid-2006. Subsequently, DTSC staff began developing these proposed emergency regulations to ensure that DTSC's regulations would incorporate the updated requirements. Additionally, the California Land Reuse and Revitalization Act of 2004 (CLRRA) effective January 1, 2005, established immunity qualification provisions in Health and Safety Code, Division 20, Chapters 6.82 and 6.83, and requires that participants comply with AAI (including use of the ASTM Standard) prior to property acquisition.

DTSC's Residential Pesticide Study was also in final stages of completion (May 2006) when work began on these emergency regulations. DTSC has determined that the need to incorporate testing standards for OCPs should be incorporated as part of the emergency finding in order to streamline testing and property approval, and thereby expediting approvals for State Bond fund allocations to school districts.

To eliminate and/or minimize the public school overcrowding is an important part of California's mandate to "protect the health and welfare" of our school age children. The Department of Education has identified a dire need for new school classrooms and school construction in many school districts in California due to extreme overcrowded conditions. The California Department of Education (CDE) has identified 947 schools in the State as being "critically overcrowded," that is, exceeding school density formulas-- 90 students per acre for grades kindergarten through 6th grade (K-6); 115 students per acre for grades 7 through 12. A list of qualifying source schools is available on the CDE website: <http://www.cde.ca.gov/ls/fa/co/>

Additional information about the Critically Overcrowded Schools Program may be found at the Department of General Services' Office of Public School Construction (OPSC) website: <http://www.opsc.dgs.ca.gov/COSProgram/Default.htm>

Information concerning the State's Five-Year Plan for new construction and modernization is available from CDE's "School Facilities Fingertip Facts" developed in January 2006: <http://www.cde.ca.gov/ls/fa/sf/facts.asp>

As of September 28, 2005, CDE projected the number of un-housed students in the next five years as 847,680, and the number of new classrooms needed in California in the next five years as 32,470, based on an average number of 25 students per classroom in grades K-6, and 27 students per classroom in grades 7-12. In addition, DTSC has been advised by CDE that the cost of school construction has greatly increased in the past year; costs in Los Angeles are approaching \$500 to \$600 per square foot. One of the criteria considered by DTSC in filing emergency regulations is the extent to which a deferral of a response action at a site will result, or is likely to result in, a rapid increase in response costs at the site or a significant increase in risk to human health or safety or the environment. Reducing the amount of time it takes to investigate and/or cleanup expanding or new school sites, helps to ease California's critically overcrowded schools.

School districts compete for State bond funding, and must gain approval of new or expansion projects from CDE before applying to OPSC for funding allocations, which are made to districts by the State Allocation Board following OPSC approval of eligibility. DTSC approval is required for environmental assessments, investigations and cleanups prior to CDE's issuance of site and plan approval. A spreadsheet listing districts which have applied for State funding for specified school sites is available on OPSC's website at:

http://www.documents.dgs.ca.gov/opsc/Resources/SFP/NewConst_Funding.pdf

The proposed regulations will benefit all school districts conducting environmental assessments pursuant to the Education Code. Under Education Code section 17076.10, subsection (b), school districts have 18 months from receipt of State bond funds to show substantial progress toward construction, or they risk losing these funds. These regulations will allow school districts to submit a Phase I Addendum for approximately 15% of school projects which may have residential structures that require testing for OCPs from termiticide application. These emergency regulations will allow school districts to proceed quickly with school construction if DTSC approves the Phase I Addendum and concurs that further investigation of the site is not required.

Use of the Phase I Addendum for OCPs would reduce the school districts environmental review process time by at least 30 days, and possibly by as much as six months. Without the emergency regulations, school districts under current law would need to prepare and submit a PEA for OCPs to DTSC, and go through a mandatory 30-day public review period for properties otherwise considered unlikely to have this type of contamination, such as residential properties. DTSC's evaluation of the Phase I Addendum for OCPs under the emergency regulations will enable the school districts to move quickly into additional sampling and cleanup if it is needed, and/or show substantial progress toward school construction, which will help them avoid the potential loss of State funding. Approval of the emergency regulations is necessary to ensure the ongoing benefits of the Phase I process.

The emergency regulations will preserve scarce resources for school districts, saving preparation costs by allowing school districts to prepare a Phase I Addendum in lieu of a PEA for prospective school sites with former residential or commercial properties where potential use of OCPS for termiticides may have occurred. This savings would be from both DTSC oversight costs and from contractor costs. In calendar year 2005, DTSC oversight costs for 93 Phase Is for school projects averaged \$1,809 each. Average DTSC oversight costs for 11 schools where Phase I Addenda were reviewed, in addition to the Phase Is, was an additional \$1,209 each. DTSC oversight costs for 130 PEAs in calendar year 2005 averaged \$14,979 each. The average DTSC oversight cost for a Phase I and Phase I Addendum in 2005 was \$3,018, as compared to a total cost of \$17,997 for a Phase I, Phase I Addendum and PEA. Additionally, school districts contract with environmental professionals to prepare these environmental documents. Contractor costs vary widely; however, DTSC's Schools Division has negotiated contracts with private consultants for preparation of nine pilot project PEAs funded by federal grants, which ranged from \$35,000 to \$85,000 each, and averaging \$60,645 (between 2000 and 2005). It is DTSC's understanding that some private contractors have charged over \$200,000 for one PEA for some school sites, while charging between \$7,000 and \$10,000 for preparation of Phase Is, and between \$10,000 to \$15,000 for preparation of Phase I Addenda.

The anticipated result of not having these emergency regulations approved immediately is:

- (1) Phase Is submitted to DTSC will be out of compliance with the new federal government standards, effective November 1, 2006, for the AAI provisions (ASTM Standard E1527-05). As of November 1, 2006, the existing Phase I regulations reflect an outdated standard (ASTM E1527-00). AAI is the process for evaluating a property's environmental contamination, often referred to as "environmental due diligence" for the purpose of real property transactions and qualifying for landowner liability protections under CERCLA (federal law) and State law. To be eligible for federal liability protections under the 2002 Brownfields Amendments, bona fide purchasers, contiguous property owners, and innocent landowners must comply with AAI and use ASTM Standard E1527-05 to satisfy this requirement. School districts that do not conduct property assessments prepared in compliance with the new standards will be submitting incomplete assessments, which would lack pertinent required information, e.g., off-site impacts, previous site operations, review of land title records, data gaps, etc., as required in the new standard. Such deficiencies jeopardize the accuracy and validity of the Phase I Environmental Site Assessment, and result in a failure to identify all recognized environmental conditions. For example, the environmental assessment could fail to identify the presence or likely presence, or release or threat of release, of any hazardous

substances on a property. Consequently, school districts that do not comply with usage of the new standard are ineligible for federal or State liability protections for response costs or damages caused by release of hazardous materials. In 2005, DTSC received 119 Phase I and/or Phase I Addenda requests. In 2006 (as of November 21, 2006), DTSC has received 97 requests for a Phase I and/or Phase I Addenda. Over the next four to six months, DTSC anticipates that approximately 50 proposed new or expanding school sites will submit Phase I and/or Phase I Addenda requests. This is the number of schools that would be impacted if these emergency regulations are not approved. School districts that do not use the new and more stringent ASTM standards will not qualify for immunity protection from liability for claims made by any person for response costs or other damages associated with a release of hazardous materials.

- (2) Districts submitting property evaluation reports for proposed or expanding school sites with OCPs in soils from termiticide application will not be able to use the Phase I Addendum process; they will instead have to complete a PEA. Preparation of a full PEA will add anywhere from one to six months (and in some instances can take up to a year) to the process before a school district can request funding to begin the planning and construction of a new or expanding school site. It is estimated that this will impact at least 50 proposed or expanding school sites in the next four to six months.
- (3) These emergency regulations will impact how quickly school districts can make new classrooms available. Additional delays in completion of environmental assessments and investigations will result in school construction delays, with fewer schools and fewer new classrooms made available to ease the critical overcrowding of California's school age children.
- (4) Delays in receipt of State bond funds may result in school districts losing their ability to purchase appropriate property if the investigation and evaluation process takes too long, due to rising construction costs and costs of real property. This is a major concern for many urban areas throughout the State where available property is limited or too expensive.
- (5) The procedural changes reflected in the emergency regulations will expedite document preparation and review timeframes, saving public resources and minimizing the cost and burden of environmental reviews on school districts, while ensuring that environmental testing is properly conducted and evaluated. These regulations will result in some school facilities being approved as eligible for acquisition and/or construction funding sooner than they would have been if these regulations were not approved, and will expedite the building of new schools. In addition, these regulations will facilitate and clarify environmental assessment statutory requirements in the Education Code.

CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) COMPLIANCE

DTSC has found this rulemaking project to be exempt under CEQA. A draft of the Notice of Exemption (NOE) is available for review with the rulemaking file and the NOE will be filed with the State Clearinghouse when the regulations are adopted.

FISCAL IMPACT ESTIMATES:

Mandates on Local Agencies and School Districts: DTSC has made a preliminary determination that adoption of these regulations will create no new local mandates. These regulations provide a voluntary option to school districts that choose to conduct a Phase I. Any mandates that are imposed on school districts already exist in statute and these regulations impose no new mandates.

Estimate of Potential Cost or Savings to Local Agencies Subject to Reimbursement: DTSC has made a preliminary determination that adoption of these regulations will not impose a local mandate or result in costs subject to reimbursement pursuant to part 7 of division 4, commencing with section 17500, of the Government Code or other nondiscretionary costs or savings to local agencies.

Cost or Savings to Any State Agency: The requirements for completion of a Phase I in the regulations would have no fiscal impact on DTSC because the regulations merely clarify Phase I activities required by current law. The regulations could result in some additional costs for DTSC to review a Phase I Addendum. However, any costs for DTSC to review the Phase I Addendum would be reimbursed by the school district.

Cost or Savings in Federal Funding to the State: DTSC has made a preliminary determination that the proposed regulations will have no impact on Federal revenue or costs.